

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANIEL FERRIE,

Plaintiff,

v.

KMART CORPORATION,

Defendant.

Civil Action No: 04-12068 (JLT)

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION TO REOPEN DISCOVERY FOR 60 DAYS**

Defendant, Kmart Corporation ("Kmart"), hereby opposes the motion of plaintiff, Daniel Ferrie ("Ferrie"), to reopen discovery for 60 days. As grounds for its opposition, Kmart states as follows:

1. In this case, Ferrie raises claims about the termination of his employment, which occurred on March 1, 2004, including a claim that such termination constituted age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). Ferrie filed a charge of discrimination with Equal Employment Opportunity Commission on June 15, 2004, and he removed that charge to pursue his claims in court on or about October 4, 2004.

2. Yet, in this court case, Ferrie has continued to pursue discovery into every promotion that occurred within Kmart since he began working there in 1998. Three particular promotions/hirings which Ferrie continues to attempt to put at-issue are as follows:

- a. The promotion of Daniel Nicolini to District Manager, which occurred on July 26, 2001 (over two and one-half years before Ferrie's termination).
- b. The promotion of David Bennett to District Manager, which occurred on December 17, 2001 (over two years before Ferrie's termination).
- c. The hiring of Carlton James as District Manager, which occurred on July 15, 2001 (over two and one-half years before Ferrie's termination).

(See Exhibit A hereto)

3. There is a six month statute of limitations (which may be 300 days under appropriate circumstances) for a plaintiff to bring a claim under the ADEA. See 29 U.S.C. § 626(d). As such, any claim by Ferrie about these promotions/hirings is clearly time-barred.

4. Discovery began in this case in January 2005. Ferrie was deposed on February 28, 2005 and, in his deposition, he expressed his awareness that Nicolini, Bennett and James were made District Managers. (See Exhibit B hereto) Ferrie claimed that they were supposedly given their positions “ahead of him.” (Id.)

5. By letter dated July 13, 2005 – i.e., 6 and 1/2 months after discovery began, and over 4 months after his deposition -- Ferrie wrote to Kmart seeking production of the personnel records of Nicolini, Bennett and James.

6. Notwithstanding the fact that Ferrie’s claims about the promotions/hirings of these District Managers are clearly time-barred, their personnel files were produced to Ferrie on July 28, 2005. Together, these personnel files represent the so-called “350 additional documents” Ferrie references in his motion to reopen discovery by 60 days. (See Ferrie Motion, ¶ 2)

7. By Order of this Court dated May 12, 2005, discovery closed on July 29, 2005. Ferrie now belatedly seeks to re-open discovery to (i) potentially take the depositions of Nicolini, Bennett and James, (ii) potentially move to re-open the Rule 30(b)(6) deposition of Kmart or (iii) potentially serve requests for admission. (See Ferrie Motion, ¶ 4)

8. Discovery should not be left open for 60 days for Ferrie’s “potential” further discovery. Rather, discovery should remain closed.

9. To date, Ferrie has never even sent a notice of deposition to take the deposition of Nicolini, Bennett or James. He certainly had that opportunity in the 7 months discovery has been proceeding in this case. He has also never served any requests for admission despite ample opportunity to do so. As for Ferrie's Rule 30(b)(6) deposition, he has already had substantial time to inquire of Kmart's Rule 30(b)(6) designee about the timely claims in his complaint – i.e., claims about his termination. That deposition should not be reopened now.

9. In short, this Court should not re-open discovery for Ferrie to seek further information about Nicolini, Bennett and/or James, particularly since any claims Ferrie may raise about their promotions/hiring are clearly time-barred.

WHEREFORE, Ferrie's motion to reopen discovery should be denied.

KMART CORPORATION

By its attorneys



David S. Rubin, Esq. BBO# 546213

Jeffrey M. Rosin, Esq. BBO #629216

FOLEY & LARDNER LLP

111 Huntington Avenue

Boston, MA 02199

(617) 342-4000

Dated: August 1, 2005

EXHIBIT A

Job Summary

Home > Administer Workforce > Administer Workforce (GBL) > Inquire > Job Summary

New Window

Job Summary

NICOLINI,DANIEL

EmplID: 01000066220

SSN: 114683657

Job Information

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General	Job Information	Work Location	Compensation
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Eff Date	Sequence	Jobcode	Empl Type	Empl Status	Full/Part Time	Reg/Temp	Standard Hours	Work Pe
02/16/2005	0	Str MgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/27/2005	0	StrMgrIII	Salaried	Active	Full-Time	Regular	48.00	Weekly
06/07/2004	0	StrMgrIII	Salaried	Active	Full-Time	Regular	48.00	Weekly
05/27/2003	0	Str MgrVI	Salaried	Terminated	Full-Time	Regular	48.00	Weekly
01/30/2003	0	Str MgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
09/01/2002	0	DTM	Salaried	Active	Full-Time	Regular	48.00	Weekly
08/09/2002	0	DTM	Salaried	Active	Full-Time	Regular	48.00	Weekly
06/16/2002	0	DTM	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/31/2002	0	DTM	Salaried	Active	Full-Time	Regular	48.00	Weekly
07/26/2001	0	DTM	Salaried	Active	Full-Time	Regular	48.00	Weekly
07/05/2001	0	StrTMgrIII	Salaried	Active	Full-Time	Regular	48.00	Weekly
07/01/2001	0	Str TMgr I	Salaried	Active	Full-Time	Regular	48.00	Weekly
05/03/2001	0	Str TMgr I	Salaried	Active	Full-Time	Regular	48.00	Weekly
05/01/2001	0	Str TMgr I	Salaried	Active	Full-Time	Regular	48.00	Weekly
02/01/2001	0	Str TMgr I	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/18/2001	0	Str TMgr I	Salaried	Active	Full-Time	Regular	48.00	Weekly
11/02/2000	0	Oper Mgr G	Salaried	Active	Full-Time	Regular	48.00	Weekly
07/27/2000	0	Rep TM D	Salaried	Active	Full-Time	Regular	48.00	Weekly
06/01/2000	0	Rep TM D	Salaried	Active	Full-Time	Regular	48.00	Weekly
04/20/2000	0	Repl TM	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/27/2000	0	Repl TM	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/06/2000	0	Repl TM	Salaried	Active	Full-Time	Regular	48.00	Weekly
12/01/1999	0	Repl TM	Salaried	Active	Full-Time	Regular	48.00	Weekly
04/22/1999	0	Repl TM	Salaried	Active	Full-Time	Regular	48.00	Weekly
11/12/1998	0	Repl TM	Salaried	Active	Full-Time	Regular	48.00	Weekly
06/19/1998	0	HL TAM MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
06/18/1998	0	HL TMgr	Salaried	Active	Full-Time	Regular	48.00	Weekly
05/07/1998	0	HL TAM MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/29/1998	0	HL AM MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/15/1998	0	HL AM MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
12/11/1997	0	Pacesetter	Salaried	Active	Full-Time	Regular	48.00	Weekly
10/30/1997	0	Pacesetter	Salaried	Active	Full-Time	Regular	48.00	Weekly

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Job Summary

BENNETT,DAVID G

EmplID: 61000007156

SSN: 089661296

Job Information

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General Job Information Work Location Compensation

Eff Date	Sequence	Jobcode	Empl Type	Empl Status	Full/Part Time	Reg/Temp	Standard Hours	Work Per
06/15/2005	0	ProTem Coa	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/27/2005	0	DTM	Salaried	Active	Full-Time	Regular	45.00	Weekly
01/29/2004	0	DTM	Salaried	Active	Full-Time	Regular	45.00	Weekly
01/30/2003	1	DTM	Salaried	Active	Full-Time	Regular	45.00	Weekly
01/30/2003	0	DTM	Salaried	Active	Full-Time	Regular	45.00	Weekly
06/16/2002	0	DTM	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/31/2002	0	DTM	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/16/2002	0	DTM	Salaried	Active	Full-Time	Regular	48.00	Weekly
12/17/2001	0	DTM	Salaried	Active	Full-Time	Regular	48.00	Weekly
07/12/2001	0	Str TMgrVI	Salaried	Terminated	Full-Time	Regular	48.00	Weekly
07/01/2001	0	Str TMgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
05/03/2001	0	Str TMgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
05/01/2001	0	Str TMgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
02/01/2001	0	Str TMgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
07/27/2000	0	Str TMgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
05/01/2000	0	Str TMgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/27/2000	0	Str TMgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
12/01/1999	0	Str TMgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
06/07/1999	0	Str TMgrVI	Salaried	Active	Full-Time	Regular	48.00	Weekly
05/01/1999	0	Str TMgrIV	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/28/1999	0	Str TMgrIV	Salaried	Active	Full-Time	Regular	48.00	Weekly
08/10/1998	0	StrTMgrIII	Salaried	Active	Full-Time	Regular	48.00	Weekly
05/07/1998	0	Str TMgr I	Salaried	Active	Full-Time	Regular	48.00	Weekly
02/01/1998	0	Str Mgr I	Salaried	Active	Full-Time	Regular	48.00	Weekly
03/13/1997	0	Str Mgr II	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/30/1997	0	Ops Mgr	Salaried	Active	Full-Time	Regular	48.00	Weekly
04/18/1996	0	Ops Mgr	Salaried	Active	Full-Time	Regular	48.00	Weekly
02/01/1996	0	HL Manager	Salaried	Active	Full-Time	Regular	48.00	Weekly
06/29/1995	0	HL Manager	Salaried	Active	Full-Time	Regular	48.00	Weekly
02/09/1995	0	HL Mgr LII	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/26/1995	0	SK HL LII	Salaried	Active	Full-Time	Regular	48.00	Weekly
07/14/1994	0	MAM-MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
05/12/1994	0	OM-MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/27/1994	0	MAM-MTP	Salaried	Active	Full-Time	Regular	40.00	Weekly
04/15/1993	0	MAM-MTP	Salaried	Active	Full-Time	Regular	40.00	Weekly
01/28/1993	0	MAM-MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/23/1992	0	MAM-MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
06/17/1991	0	MAM-MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
04/18/1991	0	MAM-MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
01/24/1991	0	MAM-MTP	Salaried	Active	Full-Time	Regular	48.00	Weekly
03/07/1990	0	Store Hrly	Hourly	Active	Full-Time	Regular	40.00	Weekly
08/09/1989	0	Store Hrly	Hourly	Active	Full-Time	Regular	40.00	Weekly
03/08/1989	0	Store Hrly	Hourly	Active	Full-Time	Regular	40.00	Weekly
07/16/1988	0	Store Hrly	Hourly	Active	Full-Time	Regular	40.00	Weekly

Job Summary

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New Window

Job Summary

JAMES,CARLTON

EmplID: 01003900060

SSN: 156725810

Job Information

View 7 First

General		Job Information	Work Location	Compensation			
Eff Date	Sequence	Jobcode	Empl Type	Empl Status	Full/Part Time	Reg/Temp	Standard
02/01/2005	0	DVPStrConv	Salaried	Active	Full-Time	Regular	45.00
01/27/2005	0	DTM	Salaried	Active	Full-Time	Regular	48.00
10/12/2004	0	DTM	Salaried	Active	Full-Time	Regular	48.00
02/01/2004	0	DTM	Salaried	Active	Full-Time	Regular	48.00
01/29/2004	0	DTM	Salaried	Active	Full-Time	Regular	48.00
05/01/2003	0	DTM	Salaried	Active	Full-Time	Regular	48.00
01/30/2003	1	DTM	Salaried	Active	Full-Time	Regular	48.00
01/30/2003	0	DTM	Salaried	Active	Full-Time	Regular	45.00
06/16/2002	0	DTM	Salaried	Active	Full-Time	Regular	48.00
01/31/2002	0	DTM	Salaried	Active	Full-Time	Regular	48.00
12/10/2001	0	DTM	Salaried	Active	Full-Time	Regular	48.00
07/25/2001	0	DTM	Salaried	Active	Full-Time	Regular	48.00
07/15/2001	0	DTM	Salaried	Active	Full-Time	Regular	48.00

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Job Summary

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07/13/1988	0	Store Hrly	Hourly	Active	Full-Time	Regular	40.00	Weekly
06/01/1988	0	Store Hrly	Hourly	Active	Full-Time	Regular	40.00	Weekly
03/27/1988	0	Store Hrly	Hourly	Active	Full-Time	Regular	40.00	Weekly
03/23/1988	0	Sys Start		Active	Full-Time	Regular	40.00	Weekly

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EXHIBIT B

Daniel Ferrie

02/28/2005

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

- - - - - x

DANIEL A. FERRIE

Plaintiff

v.

No. 04CV12068JLT

KMART CORPORATION

Defendant

- - - - - x

DEPOSITION of DANIEL FERRIE

Monday, February 28, 2005

10:00 a.m.

Foley & Lardner, LLP

111 Huntington Avenue

Boston, Massachusetts 02199

Michelle Keegan, Court Reporter

Daniel Ferrie

02/28/2005

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1 because these are people who supposedly have
2 knowledge relative to this case.

3 Mr. Ferrie, you're listed first, right?

4 A. Uh-hmm.

5 Q. And then Napier. We've talked about Napier?

6 A. Right.

7 Q. Swank, we've talked about him?

8 A. Right.

9 Q. Ryan Shea, we've talked about him?

10 A. Uh-hmm.

11 Q. Daniel LNU, is that last name unknown?

12 A. Last name unknown.

13 Q. Who is Daniel?

14 A. Another New Yorker that received a district
15 manager's promotion ahead of me.

16 Q. Was he one of the ones we talked about?

17 A. No.

18 Q. What district manager job did he get?

19 A. He got southern New Hampshire.

20 Q. And when was that?

21 A. When I was in -- Right when I went to Fall
22 River. Right after I went to Fall River.

23 Q. And approximately when did you go to Fall
24 River again?

Daniel Ferrie

02/28/2005

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1 A. It was in '01, right before.

2 Q. And was this guy Daniel, was he younger than
3 you?

4 A. Much younger and not experienced.

5 Q. Okay. Charles James, we talked about him,
6 right? He was the district manager?

7 A. Right.

8 Q. Is there anything about Charles James that
9 would be -- that we haven't talked about that's
10 relevant to your case here?

11 A. Not that I know of. He was a younger man
12 that got hired in as a district manager from Wal-
13 Mart.

14 Q. Were you already employed when James got
15 hired?

16 A. Yes, I was.

17 Q. Were you a store manager yet?

18 A. Yes, I was.

19 Q. You were a store manager when Charles James
20 got hired to be district manager?

21 A. Right.

22 Q. They both talk about that -- both Daniel and
23 Charles James, that they would have knowledge of
24 your employment and/or discrimination. What do they

Daniel Ferrie

02/28/2005

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1 know about your -- either of them know about your
2 employment or discrimination?

3 A. Well, James -- I worked directly for James.

4 Q. Did he ever discriminate against you?

5 A. Did he ever discriminate against me? No.

6 Q. And what about Daniel, would he have any
7 knowledge of your employment or discrimination?

8 A. He was part of the New York crew. And I
9 believe he would.

10 Q. What would he know?

11 A. I believe he was privy to conversations. He
12 was privy to numerous conversations on weekends and
13 weekend outings.

14 Q. And on what do you base that?

15 A. Through conversations that I had with him
16 after.

17 Q. After what?

18 A. After the outings and things that he told me
19 about.

20 Q. What did he say?

21 A. He said he would tell me things about, "Your
22 name got brought up this weekend. This one said
23 this. This one said that."

24 Q. Who said what?

Daniel Ferrie

02/28/2005

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1 A. Well, it was Ryan, Swank, him and other
2 people. He said, "Ryan said this" or "John said
3 that."

4 Q. But what is it that they supposedly said
5 about you?

6 A. It would usually be something negative.

7 Q. Like what?

8 A. One time Ryan called me a fat troll.

9 Q. So this guy Daniel told you about that?

10 A. Yeah.

11 Q. Any other instances?

12 A. I can't remember at this time. I don't
13 remember at this time.

14 Q. Well, you remember that one specifically?

15 A. I remember that one specifically.

16 Q. Do you remember anything that Swank ever
17 supposedly said about you out of your presence?
18 You've already talked about what he said to you
19 supposedly to your face.

20 A. I don't. I can't remember at this time.

21 Q. What about David Bennett, who was he?

22 A. David Bennett was the gentleman who was
23 promoted and brought back to the company, the one
24 that had the poor performance and had been brought

1 back to the company.

2 Q. And would he know anything specifically
3 about your employment or discrimination?

4 A. He would know that he got brought back over
5 me based on information I was a better performer.

6 Q. He would know about his own experience?

7 A. He would -- And on the metrics of
8 performance, he would know I was a better performer.

9 Q. How would he know that?

10 A. He would know what his metrics were and he
11 would read what my metrics were and compare them.

12 Q. Had you done that in the past? Have you
13 seen that information?

14 A. Certain information, yes.

15 Q. What information?

16 A. Certain information that when he ran a store
17 in New York, that he had, I think, a 9 and a half
18 percent shrink, almost a 10 percent shrink.

19 Q. This is the information that you said that
20 you knew because it was just generally known?

21 A. Yeah.

22 Q. Anything else? Any other information?

23 A. No.

24 Q. Reeves we've already talked about. Anything

Daniel Ferrie

02/28/2005

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1 we haven't talked about about Reeves?

2 A. No.

3 Q. Who is Mike Lardino?

4 A. Mike Lardino was the district -- was the
5 regional HR person during the Shea administration.

6 Q. All right. What would he know about your
7 employment or discrimination?

8 A. He knew that -- He was involved in the
9 conversations and knew about my offer as district
10 manager in the southern district.

11 Q. How do you know that?

12 A. Because I was told conversations had been
13 had with Lardino, Swank and Shea.

14 Q. This is what Swank told you?

15 A. Exactly.

16 Q. And that you're going to be offered this
17 job?

18 A. Uh-hmm.

19 Q. Did anyone ever say to you anything after
20 that about why you didn't get the job?

21 A. Because they hired Bennett back.

22 Q. Who told you about it?

23 A. Shea called me.

24 Q. Shea called you and said what?